(FILED JUL 31 2000)

NOT TO BE PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE Plaintiff and Respondent, v. PUAL GORDON ALLEYNE Defendant and Appellant.	GO24061 (Super. Ct. No. 96SF0371) OPINION

Appeal from a judgment of the Superior Court of Orange County, Eileen C. Moore, Judge. Affirmed.

Dennis A. Fischer and John M. Bishop for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Keith I. Motley and Warren P. Robinson, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Gordon Alleyne appeals his conviction for conspiracy to commit murder, premeditated attempted murder, and robbery, with enhancements for personally using a firearm, inflicting great bodily injury, and committing the crimes while on bail. He contends: (1) the evidence was insufficient to prove an overt act necessary for the conspiracy conviction; (2) the

trial court erred by instructing the jury as to overt acts that could not support the conspiracy charge; (3) the court improperly allowed the jury to consider overt acts committed after the conspiracy's termination; (4) the court erroneously failed to instruct the jury it must unanimously agree as to any overt act used to support the conspiracy conviction; and (5) the court erred by admitting evidence Alleyne transported marijuana for sale. We affirm.

* * *

James Weingert, the victim, owned a business which located hidden assets. Beginning in 1992, Wengert dealt with Coleman Allen's factoring business. Allen would advance Wengert 80 percent of the value of Wengert's business invoices, and Wengert's clients were instructed to pay Allen's company the amount due.

By 1994, the business relationship had gone sour. If Wengert's clients failed to pay Allen, Wengert was liable for the amount owed plus fees and interest. Allen claimed Wengert owed about $438,000; Wengert argued it was closer to $216,000, less payments. Allen pressed Wengert for security for the debt, and Wengert provided a deed of trust he forged on his wife's separate property. Allen also convinced Wengert to obtain a $500,000 insurance policy on his life, listing Allen's company as beneficiary. Wengert began to submit faked invoices to Allen and used the proceeds to repay his debt. Allen foreclosed on Wengert's wife's property, and lawsuits eventually ensued. At some point, Allen, an intense man with a hot temper, said to an employee that he wanted to kill Wengert, although he did not say why.

In February 1995, Allen asked Wengert to do a financial investigation for him, promising to credit Wengert's fee against

his debt. After two failed attempts to meet with the subject of the investigation, Allen arranged for Wengert to meet with the man at an abandoned warehouse in Los Angeles. When Wengert arrived, a man, who was not Alleyne, came up to Wengert and said, "You're supposed to meet somebody here." Wengert acknowledged he was correct.

The man explained there was a "hit out on [Wengert]" and displayed a gun. The man said Wengert's business partner had arranged the killing, but the man could not go through with it. The man told Wengert to give him his wallet and said he would fire a round so his associate around the corner would believe the killing had taken place. Wengert complied, and as he drove away, he heard a gunshot. When Wengert called Allen and told him what happened, Allen replied, "I don't need this ..." and hung up.

In June 1995, Wengert's wife sued to recover the foreclosed property. A few days later, Jane Carver was shot near a Fountain Valley park. Wengert and his wife lived in Fountain Valley at the time. Leonard Mundy was charged almost a year later with the killing. Mundy had visited Allen's business on several occasions. Mundy obtained a $40,000 loan from the business in August 1995, paid it back within a month, and obtained an additional $40,000 which was written off as uncollectable in December 1995.

Wengert attended Mundy's arraignment in May 1996. He concluded Mundy had been hired to kill his wife and had mistakenly killed the wrong person. Mundy made eye contact with Wengert and appeared to be fixated on him during the arraignment.

Before the arraignment, however, Wengert experienced a travail that gave rise to the charges in this case. In late

February 1995, Alleyne had arranged to buy $25,000 worth of marijuana in Mendocino County and sell it in Los Angeles for a $5,000 profit. About a week before the purchase, he borrowed $30,000 from Allen. This transaction was unusual for Allen's business because the loan agreement expressly dispensed with the necessity of a TRW search. Alleyne's game plan went awry when he was arrested with the marijuana on March 6 near Bakersfield.

Just over a month later, two days before a court hearing in an Allen-Wengert suit, Wengert arrived at his office building in San Clemente early one morning. While he was waiting for the elevator in the underground parking garage, a man got out of the passenger side of a car and approached him with a gun. Wengert later identified Alleyne from a photographic lineup and at trial as the man who approached. Alleyne raised his gun and demanded Wengert's wallet. After Wengert complied, Alleyne shot him once in the jaw.

Wengert fell to the ground and played dead. As Alleyne walked back to the car, Wengert heard it start. He saw the car leave, and then he arose and sought medical attention. Although Wengert's wallet was taken, Alleyne did not take his valuable watch or ring.

Unbeknown to Alleyne, Allen had died four days before the shooting. Five days after the shooting, Alleyne called Allen's business and asked if Allen had prepared another note for him. When the employee said he had not, Alleyne said he would need to speak to Allen's wife.

Allen's wife was not there, but she called Alleyne within a day or two. Alleyne said Allen owed him $45,000, and Mrs. Allen said she did not know what he was talking about. Mrs. Allen hired an attorney and an investigator, David

Warkentine, to assist her with the issue.

Warkentine called Alleyne, who told Warkentine that Allen had entered into an agreement with third parties, people with whom Mrs. Allen would not want to deal. After a telephone conversation in which Mrs. Allen verified Warkentine represented her, Alleyne agreed to meet with Warkentine.

At that meeting, Alleyne told Warkentine the debt involved a hit on a man in San Clemente who owed Allen money and had sued him. Allen did not want the man to appear at a scheduled court hearing. Although Allen was also angry with Alleyne's friend, Leonard Mundy, and wanted a hit made on him as well, Alleyne talked Allen out of it. Alleyne was not successful in talking Allen out of the hit on Wengert, however. Allen arranged for Alleyne to pay some men to carry out the hit. All these men wanted was the agreed $45,000 payment for the job.

Warkentine told Alleyne time was needed to consider the matter, and Alleyne agreed. Warkentine, of course, notified the police. A search of Alleyne's car repair business yielded a handgun cleaning kit that had been used.

Alleyne's defense at trial focused primarily on Wengert's identification of him as the shooter. Several of his friends testified he did not have a beard, an earring, or sweat suit, all of which Wengert had attributed to the shooter. A dermatologist and a defense investigator provided corroboration Alleyne could not grow a beard. An expert witness on eyewitness identification explained several factors in the case that made Wengert's identification unreliable. Alleyne also offered evidence Wengert was not a truthworthy person.

I

Alleyne contends the evidence was insufficient to prove an overt act necessary for the conspiracy conviction. Not so.

To prove a conspiracy, the prosecution must show: "(1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) Although several overt acts may be alleged, the prosecution need only prove one. (See *People v. Cribas* (1991) 231 Cal.App.3d 596, 611-612.)

Two of the overt acts alleged were that Alleyne aimed a gun at Wengert and shot him. Alleyne concedes, at least inferentially, the evidence was sufficient to prove those acts - he does not challenge his conviction for attempted murder or the enhancements that he personally used a firearm and inflicted great bodily injury. Instead, he argues those acts were not in furtherance of the conspiracy because the conspiracy terminated when Allen died. He reasons the conspiracy requires at least two conspirators, and if one of two conspirators dies before an overt act is committed, the crime is not complete.

The cases Alleyne cites support the first part of his reasoning but not the second. In *People v. Austin* (1994) 23 Cal.App.4th 1596, 1603 and *People v. Superior Court (Jackson)* (1975) 44 Cal.App.3d 494, 498, the courts noted at least two people were needed to conspire, but the cases did not involve the death of a conspirator. Instead, they involved the acquittal of coconspirators. (*Ibid.*) Alleyne cites no authority, and we have found none, that explains how the death of one of

two conspirators, who have entered into the requisite agreement, could affect the culpability of the other conspirator who goes on to commit an overt act in furtherance of the conspiracy.

People v. Eberhardt (1985) 169 Cal.App.3d 292, cited by the Attorney General, suggests the death of the only other coconspirator does not terminate the conspiracy or extinguish the culpability of the remaining conspirator. In *Eberhardt*, the defendant argued he could not be culpable for violations of certain fishing laws because the only other conspirator, his native American wife, was immune from prosecution due to her heritage. The court found the wife's immunity did not affect the husband's culpability, distinguishing *People v. Superior Court (Jackson), supra*, 44 Cal.App.3d at page 498 on the ground it involved innocence of the alleged coconspirator, not immunity. (*People v. Eberhardt, supra*, 169 Cal.App.3d at pp. 299-300.)

Like the wife in *Eberhardt*, the deceased Allen was immune from prosecution, albeit for a much harsher reason. Alleyne argues *Eberhardt* is distinguishable because Allen was immune from prosecution before an overt act was committed. But Eberhardt's wife was likewise immune before any overt act was committed; she was always immune.

Holding that the surviving conspirator is culpable for proceeding with an overt act is consistent with the rationale for making conspiracy a crime. "The theory behind th[e] principles [of conspiracy law] is that collaborative criminal activities pose a greater potential threat to the public than individual acts. 'Criminal liability for conspiracy, separate from and in addition that imposed for the substantive offense which the conspirators agree to commit, has been justified by a "group danger" rationale. The division of labor inherent in group association

is seen to encourage the selection of more elaborate and ambitious goals and to increase the likelihood that the scheme will be successful. Moreover, the moral support of the group is seen as strengthening the perseverance of each member of the conspiracy, thereby acting to discourage any reevaluation of the decision to commit the offense which a single offender might undertake. And even if a single conspirator reconsiders and contemplates stopping the wheels which have been set in motion to attain the object of the conspiracy, a return to the status quo will be much more difficult since it will entail persuasion of the other conspirators. [Citations.]' [Citations.]" (*People v. Tatman* (1993) 20 Cal.App.4th 1, 8.)

"The punishable act, or the very crux, of a criminal conspiracy is the evil or corrupt agreement. [Citations.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) Allen entered into an agreement with Alleyne to kill Wengert. Allen's death terminated his life but not the agreement. All that was left to make the agreement punishable as a conspiracy was Alleyne's perpetration of an overt act in furtherance of the agreement. The shooting was certainly that and established Alleyne's culpability.[1]

II

Alleyne argues the trial court erred by instructing the jury as to overt acts that could not support the conspiracy charge. To resolve this issue, we examine the nature of the 28 overt acts alleged in the information.

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[1] Because we conclude the Allen-Alleyne conspiracy survived Allen's death, we need to consider whether sufficient evidence showed a conspiracy between Alleyne and the person who apparently drove him to and from the Wengert shooting.

Alleyne correctly divides them into four categories. The first category includes overt acts 1 through 6, which pertained to the incident in Los Angeles, where the man Wengert met faked a shooting. The second category is comprised of overt act 7, which related to the loan. The third category includes overt acts 8 through 19, which related to the actual shooting; and the fourth category concerns overt acts 20 through 28, which related to Alleyne's efforts to get paid.

The Attorney General concedes, as the prosecutor did at trial, the first six overt acts could not support the conspiracy conviction because no evidence showed Alleyne was a member of the conspiracy when they occurred. The Attorney General agrees it was error to instruct the jury to the contrary over Alleyne's objection.[2]

The Attorney General argues the error was harmless because the prosecutor conceded in final argument these overt acts could not support the charge. We find the error was harmless for another reason.

The parties agree the standard for reviewing this error is whether it was harmless beyond a reasonable doubt, commonly known as the *Chapman* standard after *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) We find the error is harmless under an even higher standard. Before the California Supreme Court concluded the *Chapman* standard was appropriate in cases involving instructions relating to an element of the crime, it applied a reversal per se standard subject to certain narrow exceptions. (*People v. Odle* (1988) 45 Cal.3d 386, 410-411.) One of these exceptions applied when "the factual issue posed

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[2] Due to this concession, we need not determine whether the court improperly allowed the jury to consider other overt acts.

by the omitted [or defective] instruction was necessarily resolved adversely to the defendant under other properly given instructions...." (*Ibid.*)

That standard is met here. As we noted in the previous section, Alleyne does not contend the evidence was insufficient to show he shot Wengert. When the jury convicted him of premeditated attempted murder and found he personally used a firearm and inflicted great bodily injury, it necessarily found he committed at least two of the overt acts. Alleyne's only challenge to these acts is his claim the conspiracy did not survive Allen's death, a contention we have rejected. Any error instructing as to other overt acts was necessarily harmless.

III

Alleyne asserts the court improperly allowed the jury to consider overt acts committed after the conspiracy's termination. This argument is similar to the preceding contention, and even if there were error, it would be harmless for the same reason: the jury necessarily found Alleyne shot Wengert.

IV

Alleyne claims the court erroneously failed to instruct the jury it must unanimously agree as to any overt act used to support the conspiracy conviction. Our court reached a contrary conclusion in *People v. Cribas, supra*, 231 Cal.App.3d at pages 611-612. (And see *People v. Lopez* (1993) 20 Cal.App.4th 897, 904 [arriving at same result and listing other cases that have done the same]; but see *People v. Ramirez* (1987) 189 Cal.App.3d 603, 611-615 [reaching opposite result].)

Alleyne suggests we arrived at our conclusion in *Cribas* because we did "not ... have the benefit of the full treatment of the question" Alleyne offers. We need not revisit *Cribas*, however, because any error was harmless. As we have observed, the jury necessarily agreed unanimously Alleyne shot Wengert.

V

Alleyne urges the court erred by admitting evidence he transported marijuana for sale. The trial court acted within its discretion in admitting the evidence.

Evidence Code section 1101, subdivision (a) excludes evidence of a person's character, including specific instances of uncharged misconduct, to prove the person's conduct on a particular occasion. Subdivision (b), however, creates an exception to the rule when the evidence is relevant to establish some fact other than the person's character or disposition, such as motive. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

Evidence showing Alleyne was arrested with his shipment of marijuana, which made him unable to repay his $30,000 loan from Allen, certainly showed a motive to conspire with Allen to kill Wengert. The analysis does not stop with this conclusion, however. "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, original italics; and see Evid. Code, § 352.)

Alleyne relies on a number of cases that hold a defendant's poverty or indebtedness are usually inadmissible to

show motive. (See, e.g., *People v. Wilson* (1992) 3 Cal.4th 926, 939; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024; *People v. Hotan* (1982) 31 Cal.3d 815, 854.) The rule exists "because it is unfair to make poverty alone a ground of suspicion and the probative value of the evidence is deemed to be outweighed by the risk of prejudice." (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1024.)

Exceptions exist to the rule, however. For instance, when an indebtedness is directly related to the charged crime, it may be admissible to establish motive. In *Edelbacher*, the Supreme Court held evidence the defendant owed money to his wife, the murder victim, was admissible to show motive. (*People v. Edelbache, supra*, 47 Cal.3d at p. 1024.)

Similarly, evidence Alleyne owed Allen $30,000, which he could not repay after the marijuana arrest, was highly probative to show why Alleyne would conspire with Allen to kill someone he did not know. As noted, we must examine the potential prejudice as well. Some prejudice is inherent in evidence the accused committed another crime. Transportation of marijuana is not a violent crime, however, and the jury was unlikely to assume that if Alleyne was willing to transport marijuana, he would automatically be inclined to kill someone. The trial court did not abuse its discretion by concluding the evidence should be admitted.

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P.J.
CROSBY, J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

(Filed Aug 10 2000)

THE PEOPLE Plaintiff and Respondent, v. PUAL GORDON ALLEYNE Defendant and Appellant.	GO24061 (Super. Ct. No. 96SF0371) ORDER MODIFYING OPINION AND DIRECTING PARTIAL PUBLICATION; NO CHANGE IN JUDGMENT

Respondent filed a request that the opinion of this court filed herein on July 31, 2000, be certified for publication. Pursuant to rules 976(b) and 976.1 of the California Rules of Court, the facts, part I and the dispositional paragraph of the opinion are ordered published in the Official Reports. Parts II, III, IV and V are not to be published, as they do not meet the standards for publication.

It is further ordered that the opinion be modified as follows: (1) the superior court case number reflected on the caption page is changed to 96SF0371.

There is no change in judgment.

O'LEARY, J.
WE CONCUR:
SILLS, P.J.
CROSBY, J.

App. 14

Court of Appeal,
Fourth Appellate District, Division Three - No. G024061
S091406

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PAUL GORDON ALLEYNE, Defendant and Appellant

Petition for review DENIED.

(Filed Nov 15 2000)

(Received Nov 21 2000)

GEORGE
Chief Justice

California Evidence Code Provisions

§ 1101. Evidence of character to prove conduct.

(a) Except as provided in this section and in Sections 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

§ 1223. Admission of co-conspirator.

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

California Penal Code Provisions

§ 182. Definition; punishment; venue; evidence necessary to support conviction.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

§ 183. Non-criminal conspiracies; no criminal punishment.

NO OTHER CONSPIRACIES PUNISHABLE CRIMINALLY. No conspiracies, other than those enumerated in the preceding section, are punishable criminally.

§ 184. Overt act; venue

No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done.

§ 187. Murder defined.

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

§ 211. Definition.

ROBBERY DEFINED. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

§ 212.5. Robbery; degrees

(a) Every robbery of any person who is performing his or her duties as an operator of any bus, taxicab, cable car, streetcar, trackless trolley, or other vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, and used for the transportation of persons for hire, every robbery of any passenger which is perpetrated on any of these vehicles, and every robbery which is perpetrated in an inhabited dwelling house, a vessel as defined in Section 21 of the Harbors and Navigation Code which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, a trailer coach as defined in the Vehicle Code which is inhabited, or the inhabited portion of any other building is robbery of the first degree.

(b) Every robbery of any person while using an automated teller machine or immediately after the person has used an automated teller machine and is in the vicinity of the automated teller machine is robbery of the first degree.

(c) All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree.

§ 664. Attempts; punishment

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

(a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison

for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditate murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.

(c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense attempted.

(d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degree, and the punishment for the attempt shall be determined as provided by this section.

(e) Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, and the person who commits the offense

knows or reasonably should know that the victim is such a peace officer or firefighter engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

(f) Notwithstanding subdivision (a), if the elements of subdivision (e) are proven in an attempted murder and it is also proven that the attempted murder was willful, deliberate, premeditated, and admitted or found to be true by the trier of fact, the person guilty of the attempt shall be punished by imprisonment in the state prison for 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce this minimum term of 15 years in state prison, and the person shall not be released prior to serving 15 years' confinement.